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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

UNITED STATES RAILWAY ASSOCIATION, APPELLANT,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. MCARTHUR, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

RICHARD JOYCE SMITH, AS TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, DEBTOR, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Industrial Traffic League hereby respectfully moves for leave to file the attached brief *amicus curiae* in the four related cases set forth above. The consent of attorneys for the appellees was requested but unanimous consent has been refused.

The interest of the League arises from the fact that it is the largest diversified shipper organization in the United States. The members of the League operate industrial and/or commercial enterprises – large, medium, and small – and are substantial users of the various modes of for-hire transportation, including transportation by railroad. Members of the League have extensively used, and are extensively using, the transportation services of the rail carriers subject to possible reorganization under the Regional Rail Reorganization Act of 1973. Thus, the League and its members have a direct and substantial interest in the disposition of the instant case.

One of the key factors bearing upon the determination of the Fifth Amendment issues in these cases is the *public interest* underlying the challenged Act. Having reviewed the treatment of this subject in the District Court, the League believes that it can provide more complete and helpful argument to the Court on the relevancy of this factor to the ultimate decision. Unless the League is permitted to file a brief as *amicus curiae*, the vitally interested shipping public, as represented by the League, will have no opportunity to express its views on the proper resolution of this issue.

Respectfully submitted,

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v.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICUS CURIAE

STATEMENT OF INTEREST

The National Industrial Traffic League (hereinafter referred to as "the League") is the largest organization of shippers in the United States. Its members operate industrial and/or commercial enterprises – large, medium,

and small – and are substantial users of the various modes of for-hire transportation, including transportation by railroad. The League has been in continuous, active existence for more than sixty-five years. Neither carriers nor their representatives are eligible for membership in the League.

The interest of the League in these cases arises from the fact that its members have used, are using, and are planning to use the services of the Penn Central and the seven other railroads in the Northeast and Midwest currently subject to possible reorganization under the Regional Rail Reorganization Act of 1973.[1] The League actively participated in the Congressional hearings which preceded enactment of the latter statute. In providing basic transportation services to the industrial and commercial shippers of the nation, the subject railroads act as originating and delivering carriers and as participating carriers in joint hauls with other railroads.

The Regional Rail Reorganization Act of 1973 (hereinafter referred to as "the Act") was designed to meet the threat of cessation or significant curtailment of essential rail service that developed with the financial decline and entry into bankruptcy proceedings of eight major railroads of the Northeast and Midwest. It appears to the League that a decision sustaining the unconstitutionality of major provisions of the Act will insure the termination of some reorganization proceedings, and the placement of those railroads in equity receivership for the purposes of liquidation. For instance, among others, the Penn Central has been determined to be so financially debilitated that reorganization could only be accomplished under the Act. *In*

[1] Public Law 93-236, 87 Stat. 985, 45 U.S.C. §701, *et seq.*, approved January 2, 1974.

Re Penn Central Transportation Company, (E.D. Pa., 1974), Slip Opinion, p. 19. Although the approval of the Interstate Commerce Commission would be required under Section 1(18) of the Interstate Commerce Act, 49 U.S.C. §1-(18), before rail lines and operations could be abandoned, the Commission would likely be constitutionally compelled to authorize large-scale abandonments. *Brooks-Scanlon Company v. Railroad Commission*, 251 U.S. 396 (1920); *Bullock v. Railroad Commission of Florida*, 254 U.S. 513 (1921); *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924).

If such disruption or discontinuation of vital rail services comes about, members of the League will suffer an economic catastrophe of substantial and incalculable proportions. Many of these member companies of the League have developed facilities and planned operations in reliance upon the availability of public rail service. In many cases the very survival of their enterprises will depend upon continued common carrier rail service. In others, substantial curtailment of rail service will result in drastic and adverse alteration of the structure and strength of their businesses.

The fact is that alternate modes of transportation are often non-existent or are simply too uneconomic or impractical. Thus, the industrial and commercial shippers of the nation, represented by the League, have a direct and substantial interest in the revitalization and continued viability of the subject railroads under the Regional Rail Reorganization Act of 1973.

ARGUMENT

It is the League's position that the court below erred in restraining enforcement of certain provisions of the Act and declaring Sections 303 and 304(f) null and void as contravening the Fifth Amendment of the United States Constitution. Section 304(f) was held violative of the Fifth Amendment to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad. Section 303 was held unconstitutional insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute. The League contends that the Act provides a mechanism for reorganization of railroads that is consistent with the interests of the public and with the constitutional rights of owners and creditors.

A. The Court below did not give sufficient consideration to the well-established principle that the rights of creditors are limited by the interests of the public, and therefore are not absolute.

In the court below too little consideration was given to the long-standing principle that the "property" rights of creditors are subject to the right of the public to make reasonable efforts to reorganize essential common carrier rail operations on a profitable basis. The bankruptcy power directly provides for the *adjustment* of the respective rights of embarrassed debtors and their creditors and it clearly permits *impairment* of the obligation of contracts. *Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648 (1935); *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902). Yet the

Regional Rail Reorganization Act is treated by the Court below as if the rights of creditors are absolute.

It is plainly erroneous to argue that rail creditors may not be forced to accept substantial erosion of their investment during the pendency of reorganization proceedings. In *Continental Bank v. Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648 (1935), this Court held that holders of "collateral notes" of the debtor could constitutionally be compelled to accept a decline in their investment while an effort was made to reorganize the debtor under Section 77 of the Bankruptcy Act, 11 U.S.C. §205.

That this principle relates to substantial as well as minor losses was made even clearer a decade later in *Reconstruction Finance Corp. v. Denver & Rio Grande Western R.R.*, 328 U.S. 495 (1946). In that case this Court upheld a plan of reorganization despite the fact that junior bondholders (1) had lost 90 percent of the value of their claims during the ten years of reorganization and (2) had overwhelmingly voted to reject the plan of reorganization. In unequivocal language this Court declared:

> These respondents cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. The Insurance Group Committee, with fiduciary responsibility to the myriad holders of policies, and the other investors or speculators in senior bonds as well as the holders of General bonds or other investors or speculators in junior security issues, by their entry into a railroad enterprise assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs. [328 U.S. 535, 536]

In the *Penn Central Merger Cases,* 389 U.S. 486 (1968), and the *New Haven Inclusion Cases,* 399 U.S. 392 (1970), this Court reaffirmed the relevancy of the public interest to consideration of the rights of rail creditors. Confronted in the *Penn Central Merger Cases* with an argument concerning the progressive erosion of bondholders' security, this Court said:

> While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move. [389 U.S. at 510-511]

More recently, in the *New Haven Inclusion Cases,* this Court responded to the pleas of bondholders by repeating an earlier statement that those who enter into a railroad enterprise assume the special risk that interests of the public will be considered along with those of investors in the event of any depression or reorganization.[2]

Although prior to this Court's review of the New Haven reorganization, the reorganization court had reached the point where it had decided that operations could not continue without immediate inclusion in the Penn Central System, 289 F. Supp. 451, at 459, that reorganization court

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[2] 399 U.S. 392, 492, quoting, *Reconstruction Finance Corp. v. Denver & Rio Grande Western R.R.,* 328 U.S. 495, 535-36.

also squarely acknowledged the inherent public interest limitations on the rights of the bondholders:

> Both the Commission and the courts, however, have reiterated in this and in related proceedings that as bondholders of a railroad their interests are subject to such invasion as may be essential to continue the operation of the railroad for a reasonable period of time to provide an opportunity to work out a permanent plan or means of continuing the operation, if possible, to the extent that it is required by the public interest. [*Id.* at 455]

Clearly, the New Haven reorganization court engaged in the balancing of interests appropriate to such cases. It should be noted that substantial losses were imposed upon New Haven creditors before the court, after seven years of reorganization, concluded that operations would have to cease unless the merger was consummated shortly thereafter. That reorganization court described the necessary process as follows:

> The extent to which the constitutional minimum of value of property rights to which the bondholders are entitled . . . may properly be invaded in the public interest to keep railroad operations going pending a solution of the problem of reorganization, is hardly a matter which can be determined with mathematical precision. It involves a consideration of the amount and nature of the Railroad's obligations, the seriousness of adverse consequences to the public if service were terminated, the rate of losses and the feasibility of possible solutions. [*Id.* at 459]

In the instant cases the court below did not engage in the appropriate balancing of interests. The only discussion of the public interest underlying Congress' action appears in a brief summary of the Act presented "before consideration" of the constitutional claims.[3] Although the amount of erosion and the prospects of ultimate profitability are proper factors in resolving the question of an unconstitutional taking, the public interest should also enter into any determination of the extent to which erosion is permitted. Thus, the court below erred in failing duly to examine the Act in light of both the public interest and the interim financial interests of rail creditors and owners.

B. The public interest in rail reorganizaton clearly justifies interim erosion of the assets of creditors and owners.

The Regional Rail Reorganization Act represents "an heroic attempt"[4] to salvage the rail services of the insolvent railroads of the Midwest and Northeast. It is designed to reorganize the railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region and the national rail transportation system.

Congress developed this new expression of the bankruptcy power because of the compelling public need for continued rail service. Among the official findings presented in the Act are the following:

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[3] Typed Slip Opinion, p. 5.

[4] *In Re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166, Opinion and Order dated March 1, 1974, at 3. (Judicial Panel on Multidistrict Litigation).

> (3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.
>
> (4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.
>
> (5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.
>
> (6) These needs cannot be met without substantial action by the Federal Government. [Section 101(a)].

The Senate Commerce Committee's report portrays even more graphically the enormous public interest in the pending reorganizations.[5] The Committee noted that a shutdown of the Penn Central alone could "produce a decrease in the rate of economic activity in the region of 5.2%, a decrease in the entire nation of 4%, and a decrease in the

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[5] Senate Report No. 93-601, December 3, 1973.

GNP for the Nation as a whole of 2.7% after the eighth week of such a shut-down." *Id.* at 7. The Committee also reported that a study by the Indiana Department of Commerce predicted that a shut-down of the Penn Central would produce unemployment in that state of 24% during the first month and that a 60-day shut-down would cause the Indiana industrial economy to suffer a 25% reduction in capacity. *Id.* at 7.

A brief accounting of the role of the insolvent railroads in the national rail system also offers an indication of the economic disaster and chaos which would result if their rail services were discontinued. For instance, the Northeast railroads receive over 300 cars a day from the State of Alabama, over 520 a day from the State of Minnesota, and over 640 cars a day from the State of California. Cars originating in the Northeast arrive in Texas at the rate of 679 cars a day, in North Carolina at a rate above 567 cars a day, and in California at a rate above 810 cars a day. *Id.* at 8.

Thus, recognizing the necessity of continuing the rail service of the insolvent railroads, Congress passed the Regional Rail Reorganization Act of 1973. The Act modifies the procedures and supplements the financial and legal resources normally available in reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. § 205). Among other things, it provides:

> (1) expedited procedures for abandoning rail lines and discontinuing rail services (Section 304);
>
> (2) substantial obligational authority for the United States Railway Association with provision for additional amounts upon approval by joint resolution of Congress (Section 210);

> (3) funding for emergency rail needs pending implementation of the Final System Plan (Section 213);
>
> (4) subsidies for state and local rail service (Section 402);
>
> (5) benefits for adversely affected employees (Section 509).

The court below failed duly to consider the extent to which these new legal and financial resources serve the interests of both creditors and the public. Congress may not have presented an absolute guarantee of future profitability to creditors but it did provide a reasonable prospect of ultimate profitability that constitutionally justifies substantial interim erosion.

It is appropriate for this Court to give considerable weight to Congress' evaluation of both the public interest in continued rail service and the feasibility of the proposed solution. On matters of public policy Congress is entitled to substantial deference. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

The Regional Rail Reorganization Act of 1973 is an entirely reasonable response to a national crisis. In passing this statute Congress set forth a comprehensive and constitutional plan for the protection of the public and the equitable treatment of creditors and owners.

CONCLUSION

The judgment of the district court should be reversed, the constitutionality of the Act sustained and the cause remanded.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

REGIONAL RAIL REORGANIZATION CASES

UNITED STATES OF AMERICA, *et al.*, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-168)

UNITED STATES RAILWAY ASSOCIATION, Appellant

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-167)

ROBERT W. BLANCHETTE, *et al.*, Trustees of
Penn Central Transportation Company, Debtor, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-165)

RICHARD JOYCE SMITH, Trustee, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees
(No. 74-166)

ON APPEALS AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OBJECTION OF NEW HAVEN TRUSTEE AND PENN CENTRAL COMPANY TO MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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October 1, 1974

In the
Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165; 74-166; 74-167; 74-168

REGIONAL RAIL REORGANIZATION CASES

UNITED STATES OF AMERICA, *et al.*, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-168)

UNITED STATES RAILWAY ASSOCIATION, Appellant

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-167)

ROBERT W. BLANCHETTE, *et al.*, Trustees of
Penn Central Transportation Company, Debtor, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-165)

RICHARD JOYCE SMITH, Trustee, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees
(No. 74-166)

ON APPEALS AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OBJECTION OF NEW HAVEN TRUSTEE AND PENN CENTRAL COMPANY TO MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Each of the undersigned is a party in one or more

of the four related cases set forth above,[1] and in such capacity, each objects to the motion of the National Industrial Traffic League for leave to file a brief *amicus curiae*. The Court is urged to deny the motion for the following reasons:

1. Notwithstanding its public interest assertions, the National Industrial Traffic League's interest must be deemed, in the context of these cases, to be essentially private. Since the League did not seek intervention in the court below where its position could have been met on a party-to-party basis, it should not be allowed now to further its private interest in these cases without having the responsibilities of a party.

2. Even if, *arguendo*, the League's interest were deemed to be more public than private, the public interest is already protected in these cases by the parties. In addition, the undersigned have not opposed the motion of certain Members of Congress to file a brief as *amici curiae*.

[1]Richard Joyce Smith, as Trustee of The New York, New Haven and Hartford Railroad Company, Debtor, is the cross-appellant in No. 74-166 and an appellee in Nos. 74-165, 74-167 and 74-168; Penn Central Company is an appellee in Nos. 74-165, 74-167 and 74-168.

CONCLUSION

The motion of National Industrial Traffic League to file a brief *amicus curiae* should be denied.

October 1, 1974

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